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Supreme Court of the United States

October Term, 1947.

No. 673.

GAHAGAN CONSTRUCTION CORPORATION,
Petitioner,

vs.

PHILIP ARMAO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

This is an action at law under the Jones Act, 41 Stat. 1007, 46 USC § 688. The contention of the plaintiff, the respondent in this petition, is that on November 11, 1945, while he was employed by the defendant, the petitioner herein, as a deckhand and member of the crew of a dredge operated by the defendant on navigable waters of the United States in Boston Harbor, he sustained severe injuries because of the defendant's negligence.

At the time of the accident, the defendant was engaged in a dredging operation for the Commonwealth of Massa-

chusetts, the purpose of which operation was two-fold: first, material was being dredged from specified areas by the hydraulic method to be used as fill on embankments at Logan Airport in East Boston, thereby increasing the area and operations of the airport and, as a necessary appurtenance to that purpose, filling in a channel which ran in the vicinity; second, a new channel was dug much longer, wider and deeper in character than the old channel, the fill from which was being used to increase the size of the airport embankments (R. p. 85).

Dredge No. 5 on which the plaintiff was employed was one of the dredges used in this work. It pumped silt and sand from the bottom of the harbor and by means of a pipe extending from the dredge to the shore deposited them on the airport. There is no contention that the dredge had any more than limited motive power of its own.

Aside from any question of negligence, concerning which no question has been raised on appeal, the jury could have believed the following evidence:

Dredge No. 5 in November of 1945 was working in Boston Harbor in the area bounded by Logan Airport, East Boston and Winthrop (see Ex. 6); that in this area the average mean high water elevation was 9½ to 11 feet (R. pp. 80, 105), and that boats could and did operate in the area (R. pp. 77, 108-111). The plaintiff testified (R. p. 34) that he was hired to "do a seaman's work", that he was to be paid ninety cents an hour, and that his work consisted of picking up the lines, filing the anchors, setting up navigation lights, going out in a rowboat to fix the lights, repairing lines, going on a tugboat to throw out lines, and checking the running and navigation lights (R. p. 35). Exhibit 5, which is a copy of the contract between the defendant and the Commonwealth of Massachusetts, has contained within it a wage

schedule showing that the plaintiff drawing ninety cents an hour was classified as a "deckhand" rather than as a laborer. That an actual channel was dug is undisputed (R. p. 72) and that this channel replaced an old one.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by an Act of February 13, 1925, C. 229, 28 USC Sec. 347 (a).

Argument.

1. THE DECISION OF THE CIRCUIT COURT IS A MERE RESTATEMENT OF EXISTING LAW.

It is respectfully submitted that upon the above stated evidence it is clear that the plaintiff was employed on a vessel plying in navigable waters.

The argument of the defense is first based upon the assumption that either the Federal or the State compensation act applies.

The applicability of the State act is based upon the assumption that the matter is of local concern and not within the exclusive admiralty jurisdiction of Congress and the Federal Courts. It is an argument based upon such cases as *Grant Smith-Porter Ship Company v. Rohde*, 257 US 469 (1922) and its escape from *Southern Pacific Co. v. Jensen*, 244 US 205 (1917). A comparison of *Davis v. Department of Labor*, 317 US 249 (1942) and *Parker v. Motor Boat Sales*, 314 US 244 (1941) seems to indicate that there is a shadowy area in which compensation acts may overlap, but there is no indication in those cases that the Jones Act and compensation acts conflict (see Opinion, R. p. 199, 202-203).

Properly then, the question to be determined is whether the plaintiff is a member of the crew so as to exclude himself from the operation of the Longshoremen's and Harbor Workers' Act. This question must be construed in the light of the above stated evidence.

The word "crew" does not have an unvarying meaning or legal significance. Different conclusions may be drawn from the same facts. *South Chicago v. Bassett,* 309 US 251 (1940). In *Norton v. Warner,* 321 US 565 (1944), this Court defined "crew" as those naturally and primarily on board to aid in navigation, but navigation embraced duties other than "putting over the helm". The Court's definition included all those who contribute to the labors about the operation of the vessel. It is respectfully submitted that the plaintiff performed tasks within this definition and that the jury had sufficient evidence upon which to make its finding. See, also, *Schantz v. American Dredging Co.,* 138 F. (2d) 534 (C. C. A. 3rd, 1943); *Maryland Casualty Company v. Lawson,* 94 F. (2d) 190 (C. C. A. 5th, 1938); *Pariser v. City of New York,* 146 F. (2d) 431 (C. C. A. 2nd, 1945).

From the above decisions it also seems clear that "when a dredge is in navigable waters digging for land, the dredge is as much within admiralty jurisdiction as if it were a fishing boat in which the crew were seeking to get fish out of the water, or a rowboat in which the oarsmen were seeking to get sponges or clams. I cannot see any rational basis for saying that a dredge is not within admiralty jurisdiction merely because the dirt and fill which it picks up is to be put upon land. The fish which the crew of a fishing vessel takes out of the waters is ultimately in most cases destined to go into stomachs of men on land" (R. p. 21).

Your plaintiff therefore respectfully submits that by its decision the Circuit Court has reiterated to a large extent

the area of operation of the various Federal and State acts. The decision has clearly and for all times provided a simple statement concerning the separation of Jones Act cases from compensation cases, and has properly applied the doctrine of local concern to those persons who are not members of a crew contributing about the operation and welfare of the vessel. To the practicing attorney it represents a simple rule to follow in the prosecution and defense of these actions and in the economic advisement of his client as to his insurable risks.

2. THERE IS NO CONFLICT BETWEEN CIRCUITS.

The defendant has rested its argument that there is a conflict between circuits upon a line of decisions in the Fifth Circuit which state that dredges engaged in digging new channels or improving the shore are not within maritime jurisdiction. See *Fuentes v. Gulf Coast Dredging Co.*, 54 F. (2d) 69 (1931); *United Dredging Co. v. Lindberg*, 18 F. (2d) 453 (1927), cert. denied, 274 US 759 (1927); *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670, 672 (1936), cert. denied, 299 US 549 (1936). The first two of the above cited cases indicate that the particular dredges involved were not in navigable waters at the time the operations began, but were engaged in making waters which might eventually be used for purposes of navigation. The *Kibadeaux* case, *supra*, written by the same Circuit appears to make that distinction. In *Radcliff Gravel Co. v. Henderson*, 138 F. (2d) 549 (1943), the same Court had before it a question as to which compensation act should apply, State or Federal, where the employer was engaged in dredging gravel and sand from the bed of navigable waters. Two employees who were killed in the operation were engaged in trimming the sand and gravel as it was loaded onto barges, but apparently that operation consisted of not much more than

using rakes to keep the sand and gravel level in preference to allowing it to form a pyramid. They were furnished transportation to and from the shore by boat. With these facts before it, the Court held that the State compensation act did not apply and it cited, among other cases, *Parker v. Motor Boat Sales, Inc.*, 314 US 244. In *Standard Dredging Corp. v. Henderson*, 150 F. (2d) 78 (1945), the Supreme Court had before it a situation in which a company was using a dredge to enlarge and deepen a navigable channel. The dredged material was carried to the shore through a pipe and there it was distributed to make a fill later used by the county for approaches to a bridge for crossing the canal. The entire operation was done under a single contract which obviously had two purposes. The particular plaintiff worked mostly on shore managing the shore pipes which connected with the pipes from the dredge, and his only connection directly with water was that he was transported by boat to the dredge from where he walked across a series of pontoons to his employment on the shore. While walking on those pontoons, he slipped and was drowned. Said the Court, at page 80: "His work, though mostly on land, was in direct connection with and assistance of the dredge which was engaged in improving a navigable waterway. The placing of the dirt on shore was only incidental to the main enterprise, which was maritime". And again the Court rested on the *Parker* case, *supra*.

It may be said that the Fifth Circuit Court began a departure from its earlier cases in the *Kibadeaux* case, *supra*, for that case holds clearly that a seaman working upon a dredge which was engaged in clearing out navigable channels is entitled to admiralty remedies and is not bound by compensation acts, and in so doing, at page 672, the Court made the previously mentioned distinction between this case

and its earlier decisions. It is, therefore, respectfully submitted, in view of the decisions of this Court and of the Fifth Circuit, there is no longer any conflict in the matter but that it is now clear from the previous decisions and the decision in *Norton v. Warner Co.*, 321 US 565 (1944) and *Pariser v. City of New York*, 146 F. (2d) 43 (1945), the doctrine of local concern is no longer applied by any Court to a true seaman; that the doctrine was in the original instance not intended to be so applied; and that the First Circuit in holding that this case did not fall within that doctrine acted properly and in accordance with accepted and intended law; that to hold that a seaman and a member of the crew was subject to the doctrine of local concern would give to that person who has greater rights and interest in the remedies provided by the Admiralty Court a lesser right than a longshoreman, who, while also a seaman, being covered by the Longshoremen's Act, is never subjected to the doctrine of local concern. It would be an anomalous position if the longshoreman, whose right to an admiralty remedy derives from his performance of the historical seaman's duties, should find himself with greater access to the admiralty court, not subject to the doctrine of local concern, in preference to the modern seaman whose activities are more directly related to his historical antecedent and is more logically accessible to the rights of his predecessors. It is submitted that a development of the doctrine of local concern was never so intended and that so to apply it now would be in contravention to the *Jensen* rule, and those cases which attempted to avoid the *Jensen* rule, and contrary to the intention of Congress in its passage of the Longshoremen's Act.

3. THE CHARGE OF THE DISTRICT COURT AS GIVEN TO THE JURY WAS CORRECT AND DID NOT VIOLATE THE DEFENDANT'S RIGHTS.

The District Court judge in his charge (R. p. 177 *et seq.)* did not use the term "member of the crew". And in response to a request to instruct as to the meaning of the words "member of the crew under the Jones Act" (R. p. 186), the Court refused (R. p. 187).

It is true, as the Court said, that there is no such phrase in that Act. And the Court refused to comment on the Longshoremen's Act.

But the Court did give to the jury an instruction in accordance with the definition given in *Norton v. Warner Co.*, 321 US 565, at 572, namely "every one . . . who . . . contributes to the labors about the operation and welfare of the ship when she is upon a voyage" (R. pp. 180, 181).

It is respectfully suggested that the use of the specific term would add nothing which would be of help to the jury and that mention of the Longshoremen's Act would only create confusion. There is no magic phrase needed so long as the jury must of necessity from the charge find the same facts upon which to award the plaintiff damages. This, the plaintiff submits, was the necessary result of a perfectly proper, clear, well-defined charge as given by the District Court judge.

Conclusion.

It is respectfully submitted that it has been the policy of this Court "to abstain from taking a case even though it thought it erroneously decided below, whether on an issue of law or fact, if the decision did not involve an important

question of law, did not create a diversity of decision in lower courts, or would not seriously affect the administration of law in other cases. And this has been especially so where a decision below recognized the controlling legal principles but was claimed to have applied them improperly to the specific facts disclosed." *Bailey v. Central Vermont Railway,* 319 US 350, at 357.

It is clear from his Memorandum (R. p. 18) that the judge of the District Court knew the correct principles. It is suggested that he so applied them. The Circuit Court also states and applies the principles properly. The decision is a mere compilation of previous decisions reduced to their essence and stated succinctly. It is submitted further that any possible conflict between Circuit Courts could only transpire between the First and Fifth Circuits, but that this conflict does not exist by reason of the intention of the Fifth Circuit, as evidenced in its opinions, that its earlier conflicting decisions are no longer controlling on a similar statement of facts.

It is respectfully suggested that the decision of the lower courts ought not to be here reviewed; that nothing is to be gained by such a review, and the decision as it stands is a proper one.

Wherefore your respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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